Supreme Court, U.S.
FILED

No. (1)

04-858 DEC 20 2004

In The

Supreme Court of the United States

OFFICE OF THE

MICHAEL J. GRASSO, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petition for Writ of Certiorari With Appendix

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QUESTIONS PRESENTED

1. Whether a defendant can be convicted of and sentenced for money laundering under 18 U.S.C. § 1956(a)(1)(A)(i) for reinvesting the proceeds of specified unlawful activity, where the government's proof fails to show that the money allegedly laundered represented the proceeds, or net profits, from the unlawful activity as opposed to gross receipts or revenue, showing instead that they were merely ongoing business expenses.

2. Whether, in light of the this Court's decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), the enhancement of a defendant's sentence based on the amount of money laundered violated the defendant's Sixth Amendment right to a jury trial where the jury did not have to determine that the defendant had laundered the full amounts charged in each count of the indictment in order to find him guilty.

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No. 04-

In the Supreme Court of the United States

Michael J. Grasso, Jr.

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the court of appeals (App. 1a-22a) is reported at 381 F.3d 160.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2004. App. 1a-22a. A petition for rehearing was denied on September 21, 2004. App. 43a-44a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND GUIDELINE PROVISIONS INVOLVED

The relevant constitutional, statutory and sentencing guideline provisions are set forth in an appendix to the petition. App. 45a-47a.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner Grasso was convicted of 10 counts of mail fraud, 2 counts of wire fraud and 482 counts of money laundering. App. 23a. Using the money laundering sentencing guidelines, the court sentenced Mr. Grasso to 97 months of imprisonment, to be followed by 3 years supervised release, fined $150,000 and ordered to pay $761,126.39 in restitution.[1] App. 23a-43a. The United States Court of Appeals for the Third Circuit affirmed Mr. Grasso's conviction and sentencing under the money laundering guidelines but remanded the matter to the district court to reconsider its order regarding restitution and fine.

1. From early 1997 until late 1999, the period charged in the fraud/money laundering indictment, Michael Grasso ran MJG Advertising, a sole proprietorship, from an office in Spring House, Pennsylvania. Its principal but not sole business was to advertise, solicit and sell work-at-home programs and mailing lists. Individuals who purchased the programs after seeing them advertised in national magazines or being solicited directly by Mr. Grasso paid between $17.95 and $39, plus a $3 mailing fee, depending on which program they purchased. The programs had colorful names to differentiate them, such as IMEX, Mesa, GSECO, Rynex, Hazel Peppergood, among others.

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[1] Under a separate indictment, Mr. Grasso pled guilty to obstruction of justice and forgery of a judge's signature and was sentenced to 15 months imprisonment (10 months to run concurrently with the money laundering sentence and 5 months to run consecutively), 3 years of supervised release and a fine of $30,000.

The advertisements for these programs could be found in publications such as The Star, Redbook and other magazines sold at virtually every newsstand. The ads made various pitches, one of the most common being: "Earn Up To $3,000.00 Weekly Stuffing Envelopes [Or Stapling Booklets] At Home." Some of Mr. Grasso's solicitations consisted of offering for sale nothing more than a booklet listing companies which offered work that could be done at home, along with a description of the work to be done or the product to be produced.

Mr. Grasso was convicted on 10 counts of mail fraud and 2 counts of wire fraud. It was the government's theory at trial that the defendant's sales pitches were fraudulent, because rather than being paid over $150,000 per year to stuff envelopes or staple booklets, those who purchased the stuffing envelope or stapling booklet program were instead asked to participate in what amounted to a chain letter scheme. That is, they were instructed to solicit other people to purchase the exact same program they did for similar amounts that would be split with Mr. Grasso.

Mr. Grasso was also convicted on 482 counts of money laundering. The money laundering counts consisted solely of Mr. Grasso paying his printing, postage, advertising and stationery bills, a total of over $2.8 million. Each count represented the payment of a separate bill. The work and supplies covered by the bills had been completed or delivered when Mr. Grasso paid the bills, and his method of payment was with a credit card, a personal check or a wire transfer from his bank account. Both the credit cards and his bank account were in the name either of himself or his business.

2. The federal money laundering statute provides, in relevant part:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or * * *
>
> (B) knowing that the transaction is designed in whole or in part –
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . . . [is guilty of a crime].

18 U.S.C. § 1956(a)(1). The statute does not define the word "proceeds", *i.e.*, whether gross receipts or net income.

3. The court of appeals affirmed Mr. Grasso's conviction for money laundering and his sentence under the money laundering guidelines. The court characterized the government's money laundering case as simply that Mr. Grasso "paid for his business expenses with the receipts from his sales." App.6a.

Mr. Grasso contended that the term "proceeds" in the money laundering statute means "profits" or "net income," arguing that the language of the statute, the

purpose of the statute, its congressional history and the Rule of Lenity all support such an interpretation. Mr. Grasso also relied on the Seventh Circuit's decision that "proceeds" in the money laundering statute means net profits. *United States v. Scialabba*, 282 F.3d 475 (7th Cir.), *reh'g and reh'g en banc denied* (7th Cir.), *cert. denied*, 537 U.S. 1071 (2002). Therefore, since the government offered no proof of his business's profits, argued Mr. Grasso, his conviction on money laundering should be reversed and he should be re-sentenced under the fraud guidelines based on his mail and wire fraud convictions.

In holding that "proceeds" means "gross receipts", the Third Circuit discussed a number of points, none of which resolved the issue. The court initially noted that the statute does not define "proceeds". App.13a. The court said that several definitions in secondary sources undercut Mr. Grasso's interpretation, although acknowledging that these definitions were "neither uniform nor dispositive." *Id.* The court then noted that judicial definitions of "proceeds", albeit under the RICO statute, are generally more expansive than Mr. Grasso's interpretation. App.13a-14a. The court pointed out that the Seventh Circuit was alone in defining "proceeds" under the money laundering statute as "profits". App.14a.

After finding no clear answer from the sources it cited, the Third Circuit examined the money laundering statute to discern the intended scope of the term proceeds. App.15a. The court did not find help in the statute's language, but it nevertheless attacked the Seventh Circuit's interpretation of the statute. The court first characterized the Seventh Circuit's opinion as reasoning "that proceeds must be limited to net profits because money laundering is about concealment and only profits need be concealed." App.15a-16a. The Third Circuit found that the money laundering statute makes both concealment and promotion

illegal, and therefore proceeds must be something more than profits; yet it offered little rationale for reaching this conclusion. App.16a.

The court also never addressed the Rule of Lenity, which requires that ambiguities in criminal statutes be interpreted in favor of the defendant and which played an important part in the Seventh Circuit reaching the decision it did in *Scialabba*.

After oral argument in the Third Circuit and before the panel filed its opinion, this Court rendered its decision in *Blakely v. Washington*. Mr. Grasso submitted a letter pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, informing the panel of the impact of *Blakely* on his case, contending that his money laundering sentence was unconstitutional because he received an 18 level increase based on the $2.8 million allegedly laundered, a fact not necessarily found by the jury. The court did not address the *Blakely* issue in its opinion.

Mr. Grasso petitioned for rehearing and rehearing *en banc*, both of which were denied. App. 43a-44a.

REASONS FOR GRANTING THE PETITION

There is an irreconcilable split in the circuits regarding the interpretation of the term "proceeds" in the money laundering statute. The Seventh Circuit has held that "proceeds" means "net income" or "profits", while the First and now the Third Circuit have held that "proceeds" means "gross receipts." *United States v. Scialabba*, 282 F.3d 475 (7th Cir.), *reh'g and reh'g en banc denied* (7th Cir.), *cert. denied*, 537 U.S. 1071 (2002); *United States v. Iacaboni*, 363 F.3d 1 (1st Cir.), *reh'g and reh'g en banc denied* (1st Cir.), *cert denied*, 125 S. Ct. 480 (2004). In a recent filing in this Court, the government acknowledged that this conflict "raises an issue

of recurring importance that warrants the Court's review in an appropriate case." Brief for the United States in Opposition at 11, *United States v. Iacaboni*, 125 S. Ct. 480 (Nov. 8, 2004) (No. 04-183).[2] The government even suggested in its brief that Mr. Grasso's case is an appropriate case for review. *Id.* at 11-14.

A. There Is A Split In The Circuits Regarding The Interpretation Of The Term "Proceeds" In The Money Laundering Statute

The Seventh Circuit in *United States v. Scialabba*, 282 F.3d 475 (7th Cir. 2002), *reh'g and reh'g en banc denied* (7th Cir.), *cert. denied*, 537 U.S. 1071 (2002), held that a defendant cannot be convicted of money laundering unless the government proves that the proceeds in question represented net income, as opposed to gross receipts, of the underlying unlawful activity engaged in by the defendant.

In *Scialabba*, the defendants were charged with illegal gambling through the use of video poker machines which they placed in bars and restaurants, and with money laundering on the ground that they shared with the bar owners the take from the machines, using their share to meet expenses in operating, fixing and replacing the machines when necessary. The Seventh Circuit, in an opinion by Judge Frank Easterbrook, threw out the money laundering convictions on the ground that the government failed to show that the money the defendants were charged with laundering represented net income, as opposed to gross receipts. The court held that without a specific definition in the statute of the word "proceeds", "at least when the crime entails voluntary, business-like operations, 'proceeds' must be net income; otherwise the predicate crime merges into money laundering (for no business can be

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[2] This brief is available on the Solicitor General's web site. http://www.usdoj.gov/osg/briefs/2004/0responses/2004-0183.resp.pdf.

carried on without expenses) and the word 'proceeds' loses operational significance." 282 F.3d at 475.

The Seventh Circuit concluded that Congress had to have intended "proceeds" to mean net profits or net income, since money laundering is a distinct and separate crime from the underlying specified unlawful activity, and if "proceeds" is to be read as gross income or gross receipts, there would be an overlapping of criminal statutes, thereby raising the issue of whether a person can be convicted of multiple offenses when different statutes are violated by the same conduct. 282 F.3d at 477. This overlapping can be avoided by reading "proceeds" to mean net profits realized from the underlying activity. *Id.* The court analogized money laundering to a congressional levy of a tax on the "proceeds" of a casino, pointing out that the common understanding of such a tax would be that it would be on the net profits of the business, not on the total amount that was wagered at the casino. *Id.* Similarly, money laundering was designed by Congress to punish wrongdoing separate and apart from the underlying transaction, that is, on the reinvestment in legitimate businesses in order to launder or whitewash the illicit funds. If the focus is entirely on the disposition of gross revenues, as it was in *Scialabba* and was here, it loses sight of the purpose for which the money laundering statute was passed by Congress.

In *United States v. Iacaboni*, 363 F.3d 1 (1st Cir. 2004), *cert. denied*, 125 S. Ct. 480 (2004), the First Circuit concluded that "proceeds" in the money laundering statute means gross receipts, relying solely on its interpretation of "proceeds" under the RICO statute. *Id.* at 4 (citing *United*

States v. Hurley, 63 F.3d 1, 21 (1st Cir. 1995). *Iacaboni* was a forfeiture case and did not involve a term of imprisonment.[3]

B. The Court Of Appeals' Decision Incorrectly Interpreted The Term "Proceeds" In The Money Laundering Statute

The government here, completely contrary to what Congress intended when it passed the current money laundering statute, turned a garden variety fraud case with no hint of organized crime involvement into a 482 count money laundering case. It is undisputed that the government made no effort to prove that the money Mr. Grasso was charged with laundering represented the profits of his work-at-home schemes. Each of the money laundering counts charged Mr. Grasso with paying bills for the purchase of envelopes, for printing and for advertising. Mr. Grasso paid these bills with checks, credit cards or wire transfers in his or his business's name. While the payments were made during the course of the fraudulent scheme as charged in the indictment, that is, from early 1997 through late 1999, the government never presented any evidence that the payments came from the net profits of the fraudulent scheme as opposed to the gross receipts realized by that scheme, and this is where the government ran afoul of congressional intent and the plain meaning of the word "proceeds." As a result, Mr. Grasso should not have been sentenced for money laundering, and the judgment of conviction for money laundering should be set aside, as should the forfeiture of $2.8 million.

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[3] The decisions of other circuits, which are sometimes cited as resolving the definition of "proceeds", are not on point. The Sixth Circuit's decision in *United States v. Haun*, 90 F.3d 1096, 1101 (6th Cir. 1996) involved the narrow issue whether a stolen check could constitute proceeds. The Ninth Circuit's decision in *United States v. Akintobi*, 159 F.3d 401, 403 (9th Cir. 1998), addressed whether the money laundering statute was unconstitutionally void for vagueness. Neither court was asked to decide whether proceeds should be net or gross.

The money laundering statute under which Mr. Grasso was charged and convicted provides, in relevant part:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity -- with the intent to promote the carrying on of specified unlawful activity .... [is guilty of a crime].

18 U.S.C. § 1956(a)(1)(A)(i). Conspicuously missing from the statute is any definition of the word "proceeds", *i.e.*, whether it means gross receipts or net income. The plain and ordinary meaning of "proceeds" found in English dictionaries, intended by Congress and as interpreted by federal courts, we submit, is net income or profits.

Many secondary sources define "proceeds" as profits or net income. Webster's Third New Dictionary includes two definitions of proceeds as the net amount received after expenses -- "net profit made on something" and "the net sum received (as for a check, a negotiable note, and an insurance policy) after deduction of any discount or charges." Webster's Third New International Dictionary 1807 (1986). Black's Law Dictionary also defines "proceeds" as a net return -- "the funds received from the disposition of assets or from the issue of securities (after deduction of all costs and fees)." Black's Law Dictionary 1204 (6th ed. 1990).

Defining proceeds to mean net rather than gross income is also consistent with the decisions of other courts addressing this issue, albeit in other contexts. *See United States v. Cleveland*, Crim. A. No. 96-207, 1997 WL 837707, at

*7 (E.D. La. Aug. 26, 1997) ("net proceeds, not gross proceeds ... are the relevant figure for forfeiture...."); *United States v. 122,942 Shares of Common Stock*, 847 F. Supp. 105, 107 (N.D. Ill. 1994) (proceeds are the net revenues or profits under the forfeiture statute); *United States v. Milicia*, 769 F. Supp. 877, 889 (E.D. Pa. 1991) (finding "proceeds," under forfeiture statute, means revenue from illegal drug sales minus the direct costs of purchasing the prescription drugs). The Third Circuit's reliance on the generally more expansive definition given to "proceeds" in the RICO forfeiture context is misplaced, because RICO is a separate statute which Congress instructed must be construed broadly.[4]

Congress has defined "proceeds" as a form of profits in other statutes. For example, the civil forfeiture statute, which was not addressed by the panel, breaks the term "proceeds" into either "gross" or "net" depending on the underlying crime. 18 U.S.C. § 981(a)(2)(A). Under that statute, if the crime involved an illegal good, such as narcotics, any property obtained as a result of the offense can be forfeited and it "is not limited to the net gain or profit realized from the offense." 18 U.S.C. § 981(a)(2)(A). On the other hand, if the crime involved a lawful good sold in an illegal manner, proceeds then means the amount of money acquired minus the direct costs of providing the good, *i.e.*,

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[4] Several of the courts cited - the Second Circuit, Seventh Circuit and a lower court in the Third Circuit - have defined "proceeds" as some form of profits. *United States v. Masters*, 924 F.2d 1362, 1369-70 (7th Cir. 1991); *United States v. Lizza Indus.*, 775 F.2d 492, 497-99 (2d Cir. 1985); *United States v. Milicia*, 769 F. Supp. 877, 888 (E.D. Pa. 1991). The remaining RICO cases cited rely on the unique legislative history of the RICO statute indicating that Congress used the term "proceeds" in that statute to mean something other than net profits. *E.g.*, *United States v. Simmons*, 154 F.3d 765, 770-71 (8th Cir. 1998). These cases address the RICO forfeiture provision which Congress intended to be a broad and expansive remedy for the activities of organized crime. *See id.* (Congress specifically instructed that this statute must be liberally construed). Such an expansive reading, however, is not warranted where a person's liberty is at stake.

the net gain or profit. 18 U.S.C. § 981(a)(2)(B). Here, the product Mr. Grasso was selling is not contraband and hence would come under the second civil forfeiture provision, making the manner in which Mr. Grasso conducted his business illegal, not the product he sold.

While the Third Circuit acknowledged that there exist conflicting interpretations of proceeds, the court did not address the Rule of Lenity. The conflicting definitions and caselaw clearly indicate that the term "proceeds" is ambiguous and must, according to the Rule of Lenity, be read as "net income" or "profits" -- the narrower definition of "proceeds" under the money laundering statute. Under the Rule of Lenity, any ambiguity must be construed against the government and in favor of a defendant in a criminal case. *Hughen v. United States*, 495 U.S. 411, 422 (1990) (lenity principles "demand resolution of ambiguities in criminal statutes in favor of the defendant."); *see also Barnes v. Cohen*, 749 F.2d 1009, 1014 (3d Cir. 1984) (split in authority suggests that reasonable people can disagree as to the interpretation of a statute); *United States v. Twelve Firearms*, 16 F. Supp. 2d 738, 740 (S.D. Tex. 1998) (finding statute ambiguous where there are conflicting interpretations by the courts), *aff'd without opinion*, 2002 WL 31688616 (5th Cir. Oct. 28, 2002). The Rule of Lenity played a role in the court's decision and rationale in *Scialabba*. As Judge Frank Easterbrook pointed out when he said that had Congress intended gross proceeds to be the subject of money laundering, "it would have been easy enough to write 'receipts' in lieu of 'proceeds' in § 1956(a)(1), and the Rule of Lenity counsels against transmuting the latter into the former and catching people by surprise in the process." 282 F.3d at 477.

An interpretation of "proceeds" as "profits" is also supported by the congressional record. When Congress passed § 1956 as part of the Money Laundering Control Act of 1986, Pub. L. No. 99-50, 100 Stat. 3207, it did so "to fill the

gap in the criminal law with respect to the post-crime hiding of ill-gotten gains." *United States v. Bockius*, 228 F.3d 305, 310 (3d Cir. 2000) (quoting *United States v. LeBlanc*, 24 F.3d 340, 346 (1st Cir. 1994)) (emphasis added).

The congressional record is quite clear that Congress's intent in passing the money laundering statute was to address the conduct, particularly engaged in by organized crime, of transforming illegal profits into legitimate income, which is the very essence of money laundering. Throughout the money laundering debate in Congress, the record is replete with references to "profits" generated by illicit activity, and it is clear that what Congress meant in addressing the issue was net profits from organized criminal activity finding its way into a legitimate business. Gross receipts cannot make that transformation unless and until the costs of the illicit activity in question have been taken care of and do not exceed the gross proceeds or revenues. Otherwise, there would be nothing to invest, or spend, to promote further unlawful activity. Following is a sample of some of the comments made by the members of Congress during the debate:

> Gangsters and drug traffickers have demonstrated the importance they attach to money laundering by making it so pervasive and sophisticated that it has become a threat to the reputation of America's banking system. True, launderers do resort to casinos and other vehicles to hide their illegal profits. But they do not hesitate to employ local banks, banks with international customers, brokerage houses, and indeed America's financial networks.
>
> * * *

> The crime chieftains are using a variety of techniques and a variety of locations to inject their profits into the American financial system.

132 Cong. Rec. H408-01 (Feb. 6, 1986) (Statement of Rep. Lundgren).

> Simply, [money laundering] is a process by which criminals can take their illegal profits and give them the appearance of being earned legitimately.

132 Cong. Rec. H408-01 (Feb. 6, 1986) (Statement of Representative Meyers).

> Eliminating money laundering, therefore, would help to take profit out of the crime . . . . [A]n attack on money laundering is an attack on the profit of drug trafficking and other organized crimes.

132 Cong. Rec. H408-01 (Feb. 6, 1986) (Statement of Representative Fish). Finally, Senator Trible, while commenting on international money laundering, remarked that the money laundering statute was focused on transactions involving the profits of an illegal enterprise:

> The methods by which drug runners conceal their illicit profits and reinvest them in the drug trade are a vital part of the overall drug problem. The Senate recognized this reality when it voted 98-0 recently for a bill making willful laundering of profits from criminal enterprises a federal offense.

132 Cong. Rec. S12221-01 (Sept. 10, 1986) (statements of Sen. Trible).

When drafting the money laundering statute, Congress intended to create a distinct offense with separate penalties, and not simply to increase the penalties for existing crimes. *United States v. Edgmon*, 952 F.2d 1206, 1213-14 (10th Cir. 1991). Thus, money laundering requires conduct different from that which constitutes the underlying crime, such as the concealment of the nature or source of the profits from that crime. The government's case against Mr. Grasso was that he paid the bills of his business with the receipts from his business. This is not conduct distinct from the mail fraud scheme, because any scheme to defraud lasting more than a few days will undoubtedly involve the payment of expenses. Thus, Mr. Grasso's payment of his printing, advertising and envelope bills was nothing more than a part of the scheme to defraud, and not money laundering.

If "proceeds" is interpreted to mean "gross receipts," then every crime with ongoing expenses will necessarily be a money laundering case, and Congress surely did not intend that money laundering occurs every time a bill is paid. The primary evil the statute sought to address is the reinvesting of the profits of crime into a legitimate enterprise, thereby laundering or cleansing those profits; or back into a criminal enterprise to grow that enterprise, not just to pay its outstanding bills. By reading "proceeds" to mean "profits", Congress's intent is fulfilled.

C. The Question Presented Is Of Recurring Importance

The interpretation of "proceeds" in the money laundering statute presents a question of recurring importance. This is now the third case to arrive at this

Court in the past two years; the Court denied the petitions for *certiorari* in *Scialabba* and *Iacaboni*.

The government has previously indicated that this is an issue of recurring importance and has noted that Mr. Grasso's case is an appropriate case for review. In its prior submissions to this Court, the government said that the conflict over the definition of "proceeds" warrants the Court's review in an appropriate case. The government sought review in *Scialabba*. In *Iacaboni*, the government suggested that Mr. Grasso's case is appropriate for review because, unlike *Iacaboni*, this case involves both a money laundering conviction with a substantial prison sentence and there is a thorough discussion of the issue in the court below. Brief for the United States in Opposition at 11-14, *United States v. Iacaboni*, 125 S. Ct. 480 (Nov. 8, 2004) (No. 04-183).

The broad interpretation of the term "proceeds" permits prosecutors to expand the reach of the money laundering statute far beyond its original purpose. Prosecutors have sought to broaden the statute's reach because money laundering sentences are traditionally much more severe than sentences imposed for the underlying crimes. Thus, prosecutors are motivated to turn virtually every fraud case into a money laundering case. The expansion of the money laundering statute has long troubled criminal practitioners. For example, Edwin Meese, the Attorney General when Ronald Reagan signed the Money Laundering Control Act of 1986, has said:

> I think there have been instances in which money-laundering laws have been used in circumstances that are considerably different from the original intent of the law. When money-laundering statutes are used simply to pile on charges where major financial

> manipulation was not the intent nor was it related to syndicated crime, then I think the statutes would be misused.

John Berlau, *Money Laundering and Missio.. Creep*, Insight on the News (Dec. 23, 2003), *at* http://www.insightmag.com/news/2004/01/06/National/Money.Laundering.And.Mission.Creep-578104.shtml.

It is quite apparent, when one examines the applicable guidelines for both money laundering and fraud, why the government chose to indict Mr. Grasso on 482 counts of money laundering rather than on the same number of mail fraud counts, which it clearly could have done given the number of mailings involved in his scheme. The 1998 sentencing guidelines, on the facts of this case, called for a guideline range of 97 to 121 months for money laundering versus 51 to 63 months for fraud. A comparison of two other work-at-home criminal cases that were brought in the same district where Mr. Grasso was prosecuted highlights the disparity. In *United States v. Reutt*, Crim. A. No. 00-476 (E.D. Pa.), the defendant, Hans Reutt, received a two-year prison sentence for engaging in exactly the same type of scheme, *i.e.*, selling work-at-home programs, although on a somewhat less grand scale than Mr. Grasso. Michael Frumin in *United States v. Frumin*, Crim. A. No. 00-619 (E.D. Pa.), also received a two-year sentence, despite the fact that his scheme spanned three years, that it defrauded people of some $1.5 million, and that he continued to engage in his scheme after he was indicted. Neither Reutt nor Frumin were charged with money laundering, even though their schemes were identical in every way to Mr. Grasso's. The sentencing guidelines were designed to ensure uniformity in sentencing, but when the government turns a fraud case into a money laundering case in one instance, but elects not to in two others, uniformity in sentencing becomes illusory.

D. The Third Circuit Should Have Considered The Impact Of This Court's Decision In *Blakely v. Washington* On The Constitutionality Of Mr. Grasso's Money Laundering Sentence

After oral argument before the Third Circuit, this Court decided *Blakely v. Washington*, 124 S. Ct. 2531 (2004), which cast serious doubt on the continued viability of the federal sentencing guidelines. Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, Mr. Grasso submitted a letter to the Third Circuit alerting the panel to *Blakely* and its impact on Mr. Grasso's appeal. The Third Circuit did not address the *Blakely* issue in either its opinion or the denial of Mr. Grasso's petition for rehearing.[5]

In *Blakely*, this Court struck down the Washington state sentencing guidelines because they allowed a defendant's sentence to be enhanced by factors not found by the jury. This Court heard argument in two cases, *United States v. Booker*, No. 04-104, and *United States v. Fanfan*, No. 04-105, to address the effect of *Blakely* on the federal sentencing guidelines, and the cases are pending.

Mr. Grasso's 97 month sentence for money laundering violates *Blakely* because it was based on facts not necessarily or clearly found by the jury. Mr. Grasso's offense level was increased 18 levels based on the amount of money he allegedly laundered while paying for stamps, envelopes, printing and advertising in the ordinary course of his business. U.S. Sentencing Guidelines Manual §§ 2B1.1(b)(1), 2S1.1(a)(2) (2001). The jury was not asked to and did not have to make findings as to the amount of money laundered in order to find Mr. Grasso guilty of the charges,

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5 The rule in *Blakely* and this Court's decision in *Booker/Fanfan* would apply retroactively to Mr. Grasso's case, which is pending on direct appeal. *Griffith v. Kentucky*, 479 U.S. 314 (1987).

because it was charged that it need not find that the total amount alleged in each count of the indictment was laundered in order to find the defendant guilty, but only "that at least part of the property represents such proceeds." In using the $2.8 million figure to enhance Mr. Grasso's sentence from a level 12 to a level 30, the district court made a factual finding, namely that Mr. Grasso had laundered the total amount of $2.8 million charged in the indictment. Yet the jury, per the court's charge, did not have to find, and may well not have found, that this amount was in fact laundered by Mr. Grasso. Accordingly, under the rationale of *Blakely*, the district court denied Mr. Grasso his Sixth Amendment right to a trial by jury. U.S. Const. Amend VI.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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PRECEDENTIAL

UNITED STATES
COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 03-1441 / 03-1442

UNITED STATES OF AMERICA

v.

MICHAEL J. GRASSO, JR.,

Appellant

On Appeal from the
United States District Court
for the Eastern District of Pennsylvania
D.C. Criminal Action Nos.
00-cr-00051-1/01-cr-00783-1
(Honorable Berle M. Schiller)

Argued December 12, 2003

Before: AMBRO, FUENTES
and GARTH, Circuit Judges

(Opinion filed August 23, 2004)

[ENTERED: August 23, 2004]

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OPINION OF THE COURT

AMBRO, Circuit Judge

Michael J. Grasso appeals his conviction and sentence for money laundering. He argues that the term "proceeds" in the money laundering statute, 18 U.S.C. § 1956, encompasses only the net profits, and not the gross receipts, of criminal activity. This proposed statutory construction is incompatible with the text of the statute as well as existing case law in our Circuit. We therefore affirm

Grasso's conviction. However, we do remand for the District Court to reconsider its restitution award.

I. Factual and Procedural History

Grasso sold various fraudulent work-at-home schemes from early 1997 until late 1999. The programs, which were advertised in national magazines, purported to enable purchasers to earn substantial payments for at-home work, with profits to be divided between the participants and Grasso. In reality, the programs simply instructed purchasers to solicit new customers who would purchase the same programs for similar amounts.[1]

In February 2000, Grasso was indicted for mail fraud, wire fraud, and money laundering, in Criminal No. 00-51. The money laundering counts charged that he funded his ongoing criminal activity with the proceeds of his fraudulent schemes. Grasso allegedly reinvested the proceeds of his criminal activity to cover advertising, printing, and mailing expenses. Nine months later, a superseding indictment was filed, which added a count for obstruction of justice based on Grasso's attempt to access frozen funds and slightly modified the money laundering charges.[2] In December 2002, Grasso was indicted yet again, for forgery and obstruction of justice, in Criminal No. 01-783.[3] In February 2002 the District Court severed the

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[1] In addition to fraudulently promoting work-at-home employment schemes, Grasso allegedly sold mailing lists and engaged in other illegal activity. He contests many of the representations made by the Government. Because these factual matters do not affect our resolution of the issues on appeal, we do not discuss them.

[2] The original indictment contained 508 counts alleging money laundering, whereas the superseding indictment included 482 counts.

[3] The indictment charged that Grasso forged the signatures of a district judge and a deputy clerk in conjunction with fictitious letters directing various financial institutions to release his frozen funds.

obstruction of justice count in the superseding indictment in Criminal No. 00-51, which involved Grasso's first attempt to obtain frozen funds, and consolidated that count with the proceeding in Criminal No. 01-783.

Trial on the superseding indictment took place in February 2002. At the close of the Government's case, Grasso moved orally for judgment of acquittal on the mail and wire fraud counts, as well as four of the money laundering counts. The motion was denied, and thereafter a jury convicted Grasso on all charges.[4] He subsequently pled guilty to the obstruction of justice count originally filed in Criminal No. 00-51, and the cases were consolidated for sentencing.

Payment of defense counsel fees was a recurring issue during the criminal proceedings. In March 2000, Grasso filed a motion to release funds from his frozen accounts to pay defense counsel fees and expenses, and the motion was denied. The case was assigned to another judge in March 2001, and in December 2001 that judge ordered the release of $200,000 toward these expenses. In March 2002, defense counsel sought the release of additional funds from frozen accounts for payment of counsel fees. As a result, Grasso was ordered to provide documentation related to one of the non-frozen accounts, and the Probation Office examined his income and assets. The subsequent investigation of his accounts revealed that he had deposited more than $800,000 into his non-frozen accounts after the entry of a preliminary injunction in 1 999, which was intended to protect his assets for distribution to victims.

Prior to sentencing, Grasso objected to the Government's proposed sentencing order on various grounds. He moved for a downward departure and

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[4] Two money laundering counts were dismissed during the course of the trial.

submitted a memorandum in support of a "renewed" motion for judgment of acquittal on the money laundering counts, relying on the Seventh Circuit's recent decision in *United States v. Scialabba*, 282 F.3d 475 (7th Cir.), *cert, denied*, 537 U.S. 1071 (2002). Although Grasso suggested in the memorandum that he had submitted an earlier motion for acquittal on all money laundering counts, that motion challenged the sufficiency of the evidence as to Counts 444 through 447 only, and for factually specific reasons.

The District Court sentenced Grasso for the fraud and money laundering convictions to 97 months incarceration, three years supervised release, a fine of $150,000, restitution in the amount of $761,126.39, and a special assessment of $49,500. The Court made no findings in support of its award of restitution. In addition, for the obstruction of justice plea, Grasso received 15 months imprisonment (five months of which would run consecutively to the first sentence), a fine of $30,000, and a $300 special assessment. The restitution, fines, and special assessments, as well as $100,000 in counsel fees, were to be paid from the frozen funds. Grasso appeals.[5]

II. Discussion

We address two principal issues. First, did the Government need to establish that Grasso's money laundering transactions were conducted with the net profits, as opposed to gross receipts, of his illegal activity? Second, did the District Court err by failing to specify in its order of restitution the manner and schedule of payment?

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[5] The District Court exercised jurisdiction over this case pursuant to 18 U.S.C. § 3231. We have appellate jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

A. Money Laundering Convictions and Sentence

Grasso alleges that the Government transformed a "garden variety fraud case with no hint of organized crime involvement into a 482 count money laundering case." Grasso's conviction for money laundering was based on his "reinvestment of proceeds" for the purchase of advertisements, telephone services, printing, envelopes, and other materials in furtherance of his fraudulent activity by means of wire transfer, checks, and credit cards. Simply put, Grasso paid for his business expenses with the receipts from his sales.[6] The relevant statute, 18 U.S.C. § 1956, provides:

> (a)(l) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or
>
> (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or
>
> (B) knowing that the transaction is designed in whole or in part—

---

[6] Grasso argues that the payments were made for past purchases. The Government disputes this claim as a factual matter. We have held, in any case, that it is possible to "promote" unlawful activity, within the meaning of the money laundering statute, even if it has already been completed. *United States v. Paramo*, 998 F.2d 1212, 1218 (3d Cir. 1993).

> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
>
> (ii) to avoid a transaction reporting requirement under State or Federal law,
>
> [commits a felony].

The statute does not define "proceeds." Grasso contends that the term should be understood—as a matter of textual interpretation, congressional intent, and policy—to mean "net profits." The Government, by contrast, urges us to adopt a broader definition encompassing all gross receipts of illegal activity.

1. Standard of Review

Grasso has framed the question presented in his appeal as "[w]hether a defendant can be convicted of and sentenced for money laundering under 18 U.S.C. § 1956(a)(l)(A)(i) for reinvesting the proceeds of specified unlawful activity, where the government's proof fails to show that the money allegedly laundered represented the proceeds, or net profits, from the unlawful activity as opposed to gross receipts or revenue." At its core, Grasso's appeal challenges the sufficiency of the evidence upon which he was convicted.[7] In other words, "[h]e contends that, as a matter of law, the facts do not support the conclusion that money laundering occurred." *United States* v. *Morelli*, 169 F.3d 798, 802 (3d Cir. 1999) (classifying as a "sufficiency of the evidence" argument the defendant's claim that his conviction for money laundering was premised on a

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[7] It is undisputed that the Government presented no evidence suggesting that Grasso's payments and expenditures were funded with net profits of the fraudulent scheme rather than gross receipts.

faulty statutory construction). While Grasso urges us to review the District Court's judgment *de novo,* the Government contends that we should review it for plain error because he failed to raise his statutory argument in a Rule 29 motion for judgment of acquittal and therefore forfeited it.

The Federal Rules of Criminal Procedure dictate when a criminal defendant may challenge a conviction that is based on insufficient evidence. Rule 29 provides that a defendant must make an appropriate motion within seven days after a guilty verdict is entered, or within an extended time specified by the Court during the seven-day period. If a defendant fails timely to raise an argument that may establish his or her innocence, the court is unlikely to find it persuasive at a later time. *See, e.g., United States v. Powell,* 113 F.3d 464, 466-67 (3d Cir. 1997) ("If a defendant fails to file a timely motion for judgment of acquittal, we review sufficiency of evidence for plain error.").

The jury convicted Grasso on February 25, 2002. He did not file a motion within seven days of the verdict, nor did the Court extend the applicable period. On October 9, 2002, however, he filed a memorandum including an argument in support of his "renewed motion for judgment of acquittal on the money laundering counts." Although it was clear that Grasso had failed to file a timely Rule 29 motion,[8] the parties agreed at oral argument that the District Court would consider the "renewed" motion "for the limited purpose of determining whether Defendant should be sentenced under the money laundering or fraud guidelines.

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[8] As already noted, at the close of the Government's case the defense moved for judgment of acquittal on four of the money laundering charges. The motion did not allege that the Government had failed to demonstrate the use of net proceeds.

"[9] That motion did not serve to preserve the statutory argument for *de novo* review.

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9 Grasso has framed his argument as a challenge to his sentence rather than his conviction. As a general matter, "[w]e review the district court's application of the sentencing guidelines *de novo*." *See United States* v. *Omoniyi*, 260 F.3d 291, 297 n.8 (3d Cir. 2001). We thus may vacate a sentence if we find that it was improperly entered. But in this case the District Court had no choice but to sentence Grasso for money laundering. "In cases ... in which several counts, including fraud and money laundering, have been grouped, ... the count carrying the highest applicable offense level must apply to the entire group for sentencing purposes. Under the guidelines as amended, ... courts have no discretion to decide that the money laundering guideline is inappropriate or not the most applicable guideline on the facts of a given case." *United States v. Diaz*, 245 F.3d 294, 303 (3d Cir. 2001) (citation omitted). Plenary review of the sentence alone does Grasso no good, because we may inquire only whether, assuming he was lawfully convicted of money laundering, the District Court properly calculated his sentence. Upon the facts presented, there is no doubt that it did.

Grasso's strategy, of course, is slightly outside the letter of *Diaz*. He urged the District Court to sentence him for fraud rather than money laundering not because the sentencing guidelines applicable to the latter more appropriately reflected the scope of his criminal activity, but rather because he contended he should not have been convicted of money laundering in the first place. Were we to accept this gambit, we would permit Grasso to end-run the principle that a court should not disturb a jury verdict unless the defendant timely objects. *See Carlisle v. United States*, 517 U.S. 416, 433 (1996) (holding that a district court is without discretion to grant a defendant's untimely motion for judgment of acquittal pursuant to Rule 29).

In a similar vein, Grasso relies heavily on our decision in *United States* v. *Morelli*, 169 F.3d 798, 801 (3d Cir. 1999), in which we held that the defendant was not obligated to challenge his money laundering conviction in a Rule 29 motion. In *Morelli*, the jury found that money laundering was merely one among several bases for his RICO conspiracy conviction. Because the conviction rested on independent predicate acts, any contemporaneous objection to the money laundering allegations would have been futile; even if the court had agreed that the money laundering statute was inapplicable, there were adequate alternative bases to sustain the conviction. Consequently, the defendant's interpretation of the money laundering statute affected only his sentence, and the District Court's decision at sentencing was "not bound up with

The forfeiture principle may lead to harsh results. '"No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States v. Olano*, 507 U.S. 725, 731 (1993) (citing *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). Its effects are mitigated, however, by Federal Rule of Criminal Procedure 52(b), which permits a court of appeals to consider a "plain error that affects substantial rights ... even though it was not brought to the court's attention."[10]

Grasso failed to file a Rule 29 motion within the designated time. His claim does not fall within any of the recognized exceptions to the forfeiture rule. We therefore review his argument for plain error. We note, however, that the standard of review is ultimately irrelevant to our resolution of this case. Because we conclude that the District

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the jury's verdict." *Id.* at 803. In our case, by contrast, the jury specifically found that Grasso was guilty of money laundering. The District Court could not have modified Grasso's sentence without disturbing the underlying conviction.

10 "Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the court of appeals." *Olano*, 507 U.S. at 732. Nonetheless, we "should not exercise that discretion unless the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (citations omitted). The Supreme Court has clarified that we may "*correct* the error (either vacating for a new trial, or reversing outright)" only if it is "plain" and "affects substantial rights." *Id.* (emphasis in original).

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Court properly construed § 1956, we would affirm even under *de novo* review.[11]

2. Definition of "Proceeds"

Under the plain error standard, the defendant ordinarily bears the burden of proving that: (1) the court erred; (2) the error was "plain" at the time of appellate consideration; and (3) the error affected substantial rights, usually meaning that the error "must have affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734; *see also Johnson v. United States*, 520 U.S. 461, 466-68 (1997). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467 (citation omitted). Grasso cannot meet the first and most important element because the District Court did not err. Thus we need go no further.

We agree with the District Court that sentencing Grasso for money laundering was within the scope of the money laundering statute. Grasso contends, citing the Seventh Circuit's recent decision in *United States v. Scialabba*, 282 F.3d 475 (7th Cir.), *cert, denied*, 523 U.S. 1071 (2002), that he was improperly convicted of and sentenced for money laundering because the Government failed to establish that the money allegedly laundered derived from the net profits of his illegal activity. The Seventh Circuit held in *Scialabba*

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[11] Grasso argues that the Court may exercise plenary review of his claim *even if he forfeited it*, because it is based on statutory interpretation. This proposition is inconsistent with the Supreme Court's decisions in *Olano*, 507 U.S. 725 (applying plain error review to interpretation of the Federal Rules of Criminal Procedure), and *Johnson v. United States*, 520 U.S. 461 (1997) (reviewing for plain error the district court's failure to submit to the jury the question whether a false statement was material despite intervening Supreme Court case deciding as a matter of constitutional law that materiality is a jury question).

that when a "crime entails voluntary, business-like operations, 'proceeds' must be net income; otherwise the predicate crime merges into money laundering (for no business can be carried out without expenses) and the word 'proceeds' loses operational significance." *Id.* at 475.

In *Scialabba,* the defendants were convicted of operating an unlawful gambling business, filing false tax returns, conspiring to defeat tax collection, and money laundering. The last charge was based on the defendants' use of revenue from their gambling operations to meet the expenses of the business. As in our case, conviction for money laundering substantially increased the defendants' prison terms, and they therefore appealed their convictions under the money laundering statute, § 1956(a).

The Seventh Circuit rejected the Government's argument that use of gross receipts to fund ongoing criminal activity constituted money laundering. The Court explained that accepting the Government's theory would be "equivalent to saying that every drug dealer commits money laundering by using the receipts from sales to purchase more stock in trade, that a bank robber commits money laundering by using part of the loot from one heist to rent a getaway car for the next, and so on." *Id.* at 476. Transactions of this nature, the Court explained, do not implicate the concerns underlying the statute—namely, they are not "financial transactions to hide or invest profits in order to evade detection, the normal understanding of money laundering." *Id.*

While Judge Easterbrook's opinion in *Scialabba* is well-argued and intuitively appealing, we believe it reaches an incorrect result. We consider various interpretations of proceeds in light of the conventional understanding of the term, the text and purpose of § 1956, and existing case law in our Circuit. In so doing, we conclude that "proceeds," as

that term is used in the money laundering statute, means gross receipts rather than profits.

Section 1956 does not define proceeds. Judge Easterbrook assumed that "most speakers of English would understand" the term proceeds to reach only the "profits of the business." *Scialabba,* 282 F.3d at 477. Viewed in a vacuum, however, we discern no clear meaning of the term. Congress might easily have used "gross receipts" if it so intended. *Cf. Scialabba,* 282 F.3d at 477 ("It would have been easy enough to write 'receipts' in lieu of 'proceeds' in § 1956(a)(1).") But it might just as readily have used the term "profits."

Secondary sources defining the word "proceeds" undercut Grasso's proposed interpretation based on *Scialabba.* For example, the Uniform Commercial Code defines "proceeds" as "whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral. . . ." U.C.C. § 9-102(64)(A). Similarly, *Black's Law Dictionary* 1222 (7th ed. 1 999) defines "proceeds" as "the amount of money received from a sale" and lists "net proceeds" as a distinct sub-entry under "proceeds." Nonetheless, dictionary definitions are neither uniform nor dispositive. *Webster's* first definition of proceeds is "the total amount brought in," but the second is "net profit," and the third is "the net sum received . . . after deduction of any discount or charges." *Webster's Third New International Dictionary* 1807 (1986).

Judicial definitions of "proceeds" in other contexts also vary, though they are generally more expansive than the interpretation Grasso urges. In construing the scope of criminal forfeiture of "proceeds" under the Racketeer Influenced and Corrupt Organizations ("RICO") Act, most courts have held that proceeds involve more than net profits. In fact, the Seventh Circuit was unique in holding otherwise. *See United States v. Masters,* 924 F.2d 1362, 1369-70

(7th Cir. 1991). The Second Circuit and a District Court in our Circuit have held that proceeds represent "gross profits," meaning total revenues minus marginal costs, but not fixed costs. *United States v. Lizza Indus., Inc.*, 775 F.2d 492, 497-99 (2d Cir. 1985); *United States v. Milicia*, 769 F. Supp. 877, 888 (E.D. Pa. 1991). The First, Fourth, and Eighth Circuits understand the term to mean "gross revenues." *United States v. Hurley*, 63 F.3d 1, 21 (1st Cir. 1995); *United States v. McHan*, 101 F.3d 1027, 1041-43 (4th Cir. 1996); *United States v. Simmons*, 154 F.3d 765, 770-71 (8th Cir. 1998). *See generally* Anup Malani, *The Scope of Criminal Forfeiture Under RICO: The Appropriate Definition of "Proceeds,"* 66 U. Chi. L. Rev. 1289 (1999).

Turning to the money laundering statute, the Seventh Circuit is alone in its restrictive definition of "proceeds." The Sixth Circuit has noted that "proceeds," as used in § 1956, is a "commonly understood word in the English language," and includes "what is produced by or derived from something (as a sale, investment, levy, business) by way of total revenue." *United States v. Haun*, 90 F.3d 1096, 1101 (6th Cir. 1996) (quoting *Webster's Third New International Dictionary* 1807 (1971)). Similarly, the Ninth Circuit has adopted an expansive definition of "proceeds" as it is used in the money laundering statute, relying on dictionary definitions to assign it the "broad[] meaning of that which is obtained ... by any transaction." *United States v. Akintobi*, 159 F.3d 401, 403 (9th Cir. 1998) (internal citation omitted).

Only one Circuit has explicitly considered the Seventh Circuit's decision in *Sciallaba*. In *United States* v. *Iacaboni*, 221 F. Supp. 2d 104,112 (2002), *reversed in part on other grounds by* 363 F.3d 1 (1st Cir. 2004), the United States District Court for the District of Massachusetts rejected the Seventh Circuit's conclusion that proceeds should be interpreted as profits rather than total revenue. In March

2004, the First Circuit approved the District Court's reasoning, noting simply: "We have previously rejected [Appellant's] interpretation of the term 'proceeds' in the RICO forfeiture context. [He] has offered no rationale for abandoning that approach here." 3 63 F.3d at 4 (citation omitted).

Given the many definitions of "proceeds" and the uncertain value of congressional records in choosing among them,[12] the best approach, we believe, is to examine the statute itself for indications of the intended scope of the term. The Seventh Circuit's opinion reasons that proceeds must be limited to net profits because money laundering is about concealment and only profits need be concealed. But the wording of the statute suggests that concealment is only one of the statute's two purposes. The "normal understanding of money laundering" may entail "hid[ing] or invest[ing] profits in order to evade detection," as the Seventh Circuit posited, *Scialabba*, 282 F.3d at 476, but the bifurcated text of the statute strongly suggests that Congress had a broader definition of money laundering in mind.

To be sure, 18 U.S.C. § 1956 criminalizes financial transactions that satisfy the conventional understanding of money laundering—namely, transactions intended "to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified

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12 Grasso presents extensive evidence that Congress intended the Money Laundering Control Act of 1986, of which § 1956 is part, "to fill the gap in the criminal law with respect to the post-crime hiding of ill-gotten gains." *United States v. Bockius*, 228 F.3d 305, 310 (3d Cir. 2000) (quoting *United States v. LeBlanc*, 24 F.3d 340, 346 (1st Cir. 1994)). "But that was not the sole purpose of the statute." *Id.* Other rationales undercut this theory. *See, e.g., Iacaboni*, 221 F. Supp. 2d at 112 n.2 ("[The Seventh Circuit's interpretation would imply that] so long as the illegal enterprise had no net profit, no money laundering prosecution would be possible. Because Congress could not have intended such a result, the court follows the majority of circuits in holding that 'proceeds' should be interpreted as 'total revenue' rather than 'net profits.'").

unlawful activity." 18 U.S.C. § 1956(a)(1)(B)(i). But it is equally unlawful under the statute to engage in a financial transaction, knowing that the property involved represents the proceeds of unlawful activity, "with the intent to promote the carrying on of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(A)(i). In other words, the money laundering statute prohibits not only the concealment of proceeds, but also the promotion of illegal activity. By reinvesting the proceeds of his fraudulent scheme in order to sustain it, Grasso promoted unlawful activity within the meaning of the statute—regardless whether the funds were profits or gross receipts.[13]

Finally, we note that we have explicitly rejected one of the principal factors cited by the Seventh Circuit in support of its construction of the statute. The Court commented in *Scialabba:* "If ... the word 'proceeds' is synonymous with gross income, then we would have to decide whether, as a matter of statutory construction (distinct from double jeopardy), it is appropriate to convict a person of multiple offenses when the transactions that violate one statute necessarily violate another." *Scialabba,* 282 F.3d at 477 (internal citations omitted). Our Court, however, has concluded that § 1956 may subject an individual to multiple penalties based on the same crime without violating either double jeopardy *or* the principles governing statutory interpretation.

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[13] Because we believe the meaning of "proceeds" is clear from the text of § 1956, we need not consider the related policy arguments. We note, however, that various factors favor adoption of a broad definition of the term. For example, it would be very difficult to prove that "profits" were used to promote an illegal venture, since criminals rarely keep records of the overhead expenses of their illegal activities. Similarly, in an ongoing criminal business, it would be difficult to determine at what point a defendant had netted out all business expenses. When do criminal businesses operate by recognized auditing standards?

In *United States v. Conley*, 37 F.3d 970, 978-79 (3d Cir. 1994), we held that prosecution for both gambling and money laundering did not implicate double jeopardy because the statutory elements of the offenses differ; an individual is guilty of money laundering only if he or she *intended* to conceal or promote unlawful activity. The Seventh Circuit distinguished our decision in *Conley*, suggesting that if "proceeds" is interpreted broadly, the similarity between money laundering and the underlying criminal activity is problematic as a matter of statutory construction. But our Court has resolved the latter issue as well. In *United States v. Omoruyi*, 260 F.3d 291, 295 (3d Cir. 2001), we recognized that "conduct constituting the underlying offense conduct may overlap with the conduct constituting money laundering." An individual may be convicted for money laundering as long as the financial transactions are conducted with proceeds of the illegal transaction and with the intent to promote the underlying offense. *Id.*

We have regularly upheld money laundering prosecutions based on the reinvestment ("plowing back") of proceeds. *See, e.g., United States v. Diaz*, 245 F.3d 294, 305 (3d Cir. 2001); *United States v, Cefaratti*, 221 F.3d 502, 511 (3d Cir. 2000); *Conley*, 37 F.3d at 972. And we have never suggested that proceeds must be net. We see no reason to adopt such a requirement now. We therefore hold that "proceeds," as that term is used in § 1956, means simply gross receipts from illegal activity. An individual may engage in money laundering regardless whether his or her criminal endeavor ultimately turns a profit.

Thus we conclude that Grasso was properly convicted and sentenced for money laundering in violation of § 1956. In the context of our review standard, he has failed to establish error of any sort, let alone plain error.

B. The District Court's Award of Restitution

We next address Grasso's contention that the District Court erred by ordering him to pay restitution because it failed to make factual findings in support of the award. We remand for clarification.

The context is that at the time of Grasso's sentencing, the Court ordered payment of $49,800 in special assessments, $180,000 in fines, $100,000 in counsel fees, and $761,126.39 in restitution to victims of Grasso's crimes.[14] According to the pre-sentence report, Grasso at one time had assets of $1,127,691.79, of which $900,000 was in "frozen funds." But because most of the frozen funds were in market-sensitive securities and brokerage funds, they fluctuated in value. Indeed, from the time of the pre-sentence report's calculation to the date of sentencing the funds' value had decreased by more than $200,000, resulting in an apparent shortfall for the payment of restitution.

---

[14] 18 U.S.C. § 3612(c) sets the priority for payments by defendants ordered at sentencing:

> Any money received from a defendant shall be disbursed so that each of the following obligations is paid in full in the following sequence:
>
> (1) A penalty assessment under section 3013 of title 18, United States Code.
>
> (2) Restitution of all victims.
>
> (3) All other fines, penalties, costs, and other payments required under the sentence.

Id. The District Court's judgment provided for the payment of special assessments, fines, and counsel fees from the frozen funds, with the restitution ordered in Criminal No. 00-51 to be paid out of the balance. On remand, the order of payment should be reset per § 3612.

The Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. §§ 3663A-3664, enacted in 1996, requires a sentencing court to order full restitution to identified victims of certain crimes and to specify the manner and order in which restitution is to be paid. The MVRA amended the provisions for restitution set out previously in the Victim and Witness Protection Act, 18 U.S.C. § 3663 *et seq.*, pursuant to which district courts had discretionary authority to award restitution and were required to consider such factors as the defendant's financial ability to pay. *See United States v. Coates*, 178 F.3d 681, 683 n.3 (3d Cir. 1999).

Under the amended provision, the discretion of a district court in awarding restitution is limited. *Coates* set out two steps for application of the statute. First, the court must order full restitution[15] "without consideration of the economic circumstances of the defendant." *Coates*, 178 F.3d at 683 (citing 18 U.S.C. § 3664(f)(l)(A)). Second, "[a]fter ordering full restitution, the district court 'shall specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid.' In so doing, the district court is required to consider the financial resources, projected earnings, and financial obligations of the defendant." *Coates*, 178 F.3d at 683 (citation omitted).[16] Clearly it makes no sense, when the mandatory restitution sums will be paid entirely from frozen funds, to require a district court to consider the defendant's financial resources and responsibilities. While in *Coates* we held that such

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[15] Grasso's suggestion that a preliminary determination must be made whether each individual qualifies for restitution is plainly incorrect. Each individual who made a payment was "directly and proximately harmed as a result of the commission of the offense" within the meaning of 18 U.S.C, § 3663A(a)(2) and is consequently entitled to restitution.

[16] Thus, while full restitution is mandatory, "[t]he court may order the defendant to make a lump-sum payment, reasonable periodic payments, or, if the defendant is indigent, nominal periodic payments." *Id.* at 683-84.

determinations were necessary to satisfy § 3664's mandate, *id.*, the defendant there had no frozen funds to which the restitution claimants could look. We now hold that when frozen funds are adequate to satisfy restitution, a district court may stop short of *Coates*' second step. Here we have frozen funds. But we do not know their precise value, nor the number of claims to be satisfied. At the sentencing colloquy, the Government reported that the value of the frozen funds had decreased to $693,467.21, and counsel for Grasso explicitly noted that they would not cover the ordered expenditures.[17] We are therefore persuaded that a remand is necessary.

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[17] The transcript of oral argument contains the following confusing exchange:

> The Court: All right. Mr. Phillips, any reason you know of why this sentence I've just stated should not be imposed?
>
> Mr. Phillips: Your Honor, the only question I have had to do I guess with the items you listed, fine, restitution, attorney's fees, special assessment. When you add those numbers up, they're more than what is available of the frozen assets.
>
> The Court: That's correct. The balance goes to restitution.
>
> Mr. Phillips: Oh, it was the balance.
>
> The Court: Right.
>
> Mr. Phillips: Oh, okay. I'm—
>
> The Court: Whatever's left after those monies are paid is for restitution.

Arguably the District Court intended restitution to be paid only to the extent of the frozen funds. As § 3664 requires full restitution, however, this interpretation too would necessitate remand.

On remand, if the District Court should determine that the frozen funds are adequate to satisfy the full amount of restitution (after payment of $49,800 in special assessments), nothing further need be found to comply with the MVRA requirements. If, however, the funds are inadequate, the District Court should proceed in accordance with 18 U.S.C. § 3664(f)(2) to determine the manner in which, and schedule according to which, restitution is to be paid.[18]

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[18] Three additional issues bear consideration on remand. First, the Government contends that Grasso failed to claim that payment of $180,000 in fines impaired his ability to pay restitution and that he must therefore pay the fines from assets outside the frozen funds. In *United States v. Torres*, 209 F.3d 308, 312 (3d Cir. 2000), we noted that "the defendant has the burden of proving his or her ability to pay [fines]." Moreover, "[w]here ... a defendant did not at sentencing raise the issue of his or her inability to pay, a sentencing court's decision to impose a fine and the amount of the fine is reviewed for plain error." *Id.* at 313. Nonetheless, we were careful to note in *Torres* that the defendant had not argued that the District Court failed to consider his overall ability to pay a fine. Rather, he argued only that "the record before the District Court did not establish whether he had the earning capacity to pay a fine while on supervised release." *Id.* Applied to our case, if on remand there is determined to be a shortfall of funds available for fines (obviously the case if the funds are insufficient to pay restitution amounts), the District Court should consider Grasso's ability to pay this amount as well.

Second, it is apparent from the record that the District Court intended to order the payment of restitution to the 30,007 victims identified by the Government. The judgment, however, states that the restitution shall be paid to "any payees" identified by the Government. We presume that these payees are in fact the identified victims.

Finally, we note a discrepancy between the District Court's remarks during the sentencing colloquy and the payment terms set forth in the judgment. We glean from one statement by the Court at sentencing that it intended Grasso, upon his release from custody, to pay $100 per month toward any outstanding financial obligations. This provision, however, was not included in the written order. If on remand there is a shortfall to pay restitution, the Court should justify the schedule of payment by reference to Grasso's financial resources and obligations, pursuant to § 3664.

II. Conclusion

Reviewing for plain error, we conclude that the District Court's interpretation of "proceeds" in the money laundering statute was correct, and we therefore affirm Grasso's conviction and sentence. On the issue of restitution, we vacate the District Court's order and remand for reconsideration in light of the value of the frozen funds. If the Court determines that those funds are inadequate to pay restitution in the priority scheme set by 18 U.S.C. § 3612, it should follow the requirements of 18 U.S.C. § 3664(f)(2).

Sheet 1

UNITED STATES DISTRICT COURT
Eastern District of Pennsylvania

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Entered February 4, 2003

UNITED STATES OF AMERICA

v.

MICHAEL J. GRASSO, JR.

CASE NUMBER: 00-51-1

Walter M. Phillips, Jr.
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 13s

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1s - 12s; 14s - 157s 159s - 195s; 197s - 495s after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	**Nature of Offense**
18: U.S.C. §1341 and 2	Mail Fraud; Aiding and Abetting
18: U.S.C. §1343 and 2	Wire Fraud; Aiding and Abetting
18: U.S.C. §1503(a)	Obstruction of Justice
18: U.S.C. §1956 (a)(1)(A)(i) and 2	Money Laundering; Aiding and Abetting
Date Offense Concluded	**Count Number(s)**
9/16/99	1s - 9s, 11s

4/13/99	10s, 12s
2/1/00	13s
2/20/98	14s - 157s
	159s - 195s
	197s - 495s

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's So. Sec. No.:
168-52-4934

February 3, 2003
Date of Imposition of Judgment

Defendant's Date of Birth:
3/18/59

\s\ **Berle M. Schiller**
Signature of Judicial Officer

Defendant's USM No.:
53988-066

Berle M. Schiller, U.S. District Juge
Name and Title of Judicial Officer

Defendant's Residence Address:
F.D.C. at Philadelphia
P.O. Box 562
Philadelphia, PA 19106

2/4/03
Date

Defendant's Mailing Address
Same as above.

Sheet 2 – Imprisonment

Judgment - Page 2 of 8

DEFENDANT: MICHAEL J. GRASSO, JR.
CASE NUMBER: 00-51-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **97 months**

60 months on each of counts One through Thirteen.

97 months on each of counts 14 -157, 159-68, 169-195, 197-394 395-447. 448-495. All counts shall be served concurrently.

☒ The court makes the following recommendations to the Bureau of Prisons: The defendant be incarcerated at a boot camp at F.C.I. Fort Dix or Minersville.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshall for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshall.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2:00 p.m. on _____.

☐ as notified by the United States Marshall.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHALL

Sheet 3 – Supervised Release

Judgment - Page 3 of 8

DEFENDANT: MICHAEL J. GRASSO, JR.
CASE NUMBER: 00-51-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term **3 Years**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at lease ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer and controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

Sheet 3 - Supervised Release

Judgment - Page **4** of **8**

DEFENDANT: MICHAEL J. GRASSO, JR.

CASE NUMBER:00-51-1

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall not illegally possess a controlled substance.

The defendant shall not possess a firearm or other dangerous weapon.

The defendant shall provide the probation officer with access to any requested financial information and shall file a detailed monthly financial statement with the probation office. The financial statement shall include copies of bank statements for all accounts (personal, commercial, and investment), and shall also include a detailed accounting of the defendant's business income and expenditures, in addition to information concerning personal expenses and expenses to which he contributes on behalf of his dependants.

The defendant shall not incur new credit charges or open additional lines of credit (business or personal) without the prior approval of the probation officer.

The defendant shall not mail, contract the mailing, or direct the mailing of any solicitation pertaining to "work-at-home" employment opportunities.

Prior to contracting a mailing, personally directing, or mailing, any solicitation, or before placing any advertisement in the form of any printed, video or electronic medium, the defendant shall provide the probation office and the Court with a copy of the proposed solicitation and or advertisement for review and final approval.

The defendant shall provide the U.S. Probation Office with access to any requested personal and/or business financial information. The probation office is authorized to release pre-sentence and post-sentence financial information submitted by the defendant to the U.S. Attorney's Office for use in the collection of any unpaid fine or restitution. If restitution or a fine is owed, the defendant shall notify the U.S. Probation Office of any assets received and shall not

disburse his interest in any assets, including, but not limited to, income tax refunds, inheritance, insurance and lawsuit settlements, or gambling winnings without the approval of the U.S. Probation Office.

Upon release from imprisonment the defendant shall pay $100.00 per month toward any outstanding financial obligation, of any remain.

Sheet 5 - Criminal Monetary Penalties

Judgment - Page 5 of 8

DEFENDANT: MICHAEL J. GRASSO, JR.
CASE NUMBER: 00-51-1

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$49,500.00	$150,000.00	$761,126.39

☐ The determination of restitution is deferred until ____. An *Amended Judgment in a Criminal Case* (A O 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage

payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	***Total Amount of Loss**
Amount of Restitution Ordered	**Priority Order or Percentage of Payment**
TOTALS	$_____ $_____

☐ If applicable, restitution amount ordered pursuant to plea agreement $_____

☐ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

  ☐ the interest requirement is waived for the ☐ fine and/or ☐ restitution.

  ☐ the interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United

States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

Sheet 6, Part B - Criminal Monetary Penaltie

Judgment - Page **6** of **8**

DEFENDANT: MICHAEL J. GRASSO, JR.
CASE NUMBER: 00-51-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A. ☐ Lump sum payment of $_____ due immediately, balance due
- ☐ not later than _____, or
- ☐ in accordance with ☐ C, ☐ D, or ☐ E below, or

B. ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ E below); or

C. ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D. ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E. ☒ Special instructions regarding the payment of criminal monetary penalties:

Payment of the Special Assessment, Fine, and Counsel Fees shall be made from the defendant's frozen account.
Restitution shall be paid from the balance of the frozen account to any payees the U.S. Attorney's Office identifies.

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
Defendant Name, Case Number, and Joint and Several Amount:
☐ The defendant shall pay the cost of prosecution.
☐ The defendant shall pay the following court cost(s):
☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	:	
OF AMERICA	:	**CRIMINAL ACTION**
	:	
v.	:	**NO. 00-CR-51**
	:	**NO. 01-CR-783**
MICHAEL J. GRASSO, JR.	:	

MEMORANDUM AND ORDER
[ENTERED: January 15, 2003]

SCHILLER, J. January 15, 2003

On November 19, 2000, in connection with Criminal Number 00-CR-51, a grand jury issued a 495-count Superseding Indictment against Defendant Michael Grasso, Jr., charging him with mail fraud, wire fraud, money laundering, and obstruction of justice.[1] This matter was tried before Judge Kauffman and on February 25, 2002, a jury found Defendant guilty on all counts.[2] On December 20,2001, in connection with Criminal Number 01-CR-783, which was assigned to Judge Schiller, Mr. Grasso was indicted for forgery and obstruction of justice. Mr. Grasso pled guilty to these charges on June 19, 2002. Judge Schiller,

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1 On February 7, 2002, Judge Kauffman severed Count 13 (the obstruction of justice count) from Criminal Number 00-CR.-051 and ordered it consolidated with Criminal Number 01-CR-783 (Criminal Number 01-CR-783, docket no. 84).

2 This does not include the obstruction of justice count that was severed and the money laundering counts (158 & 196) that were dismissed on February 8, 2002 (Criminal Number 00-CR-51, docket no. 88).

by way of an Order dated June 21, 2002, consolidated both of these cases for the purposes of sentencing.[3] On November 20, 2002, both cases were reassigned from Judge Kauffman to Judge Schiller.

Now before the Court is Defendant's Motion for Judgment of Acquittal on the Money Laundering Counts and the Government's Reply Memorandum.[4] Defendant contends that he cannot be sentenced under the money laundering statute, 18 U.S.C. § 1956, because the government failed to prove (1) the promotion prong on of the money laundering statute and (2) that the monies expended by Mr. Grasso in the money laundering counts represented net income. For the reasons stated below I will deny Defendant's Motion and will sentence Defendant tinder the money laundering guidelines.

BACKGROUND

Between early 1997 and late 1999, Defendant operated a series[1] of massive "work-at-home" schemes. (N.T. 2/25/02, pp. 20). Using various business names,[5] Defendant placed advertisements and sent direct mailings offering

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[3] These two cases were consolidated for the administrative convenience of the Court.

[4] Mr. Grasso contends that his October 9,2002 Motion (Criminal Number 00-CR-51, docket no. 128) is a renewed motion for Judgment of acquittal on the money laundering Counts. Ordinarily, a motion for judgment of acquittal under Rule 29 must be made within 7 days after the verdict or within such time as the Court may fix during the 7-day period. *See* FED. R. CRIM. P. 29(c). However, at oral argument, the parties agreed that Defendant's motion would be considered for the limited purpose of determining whether Defendant should be sentenced under the money laundering or fraud guidelines.

[5] These names included Alternatives, Financial Enterprises, Financial Publishers, Greenhouse, GSECO, Hazel Peppergood, Imex, Mesa, Modem Mailers, PMG Associates, Rod Enterprises, Rynex, Welsh Associates, and others. (N.T. 2/25/02, pp. 22-26).

work-at-home employment. (Id., pp. 20-26). These advertisements and mailings stated that, for a fee ranging from ten to forty dollars, readers could become employed stuffing envelopes and stapling booklets at home. (Id.)

When readers mailed in their money, they received in return a set of written instructions that explained how they too could place advertisements offering work-at-home employment similar to those to which they had responded. (Id., pp. 31-32). In other words, Defendant's customers could make money working at home only if they themselves perpetrated the same scheme on others.

Between September 1997 and September 1999, Defendant deposited over ten million dollars into various bank accounts. (Id, pp. 36). Additionally, the Superseding Indictment identifies 482 separate transactions (Counts 14 through 495) in which Defendant paid for advertisements, telephone services, printing, envelopes, and other materials with the proceeds of his enterprise, (Superseding Indictment Counts 14-495, ¶5) (N.T. 2/25/02, pp. 51-53). The four entities identified in the money laundering counts are Americans Classified, Lelli Printing, Western States, and Spare Time Magazine. (N.T. 2/25/02, pp. 52-53).

DISCUSSION

A. Promotion Prong

"Section 1956(a)(1)(A)(i) makes it unlawful to conduct a financial transaction involving the proceeds of unlawful activity 'with the intent to promote the carrying on of specified unlawful activity.'" *United States v. Paramo*, 998 F.2d 1212, 1216 (3d Cir. 1993). The Superseding Indictment, upon which Defendant was convicted, states that Defendant conducted numerous financial transactions (i.e., payments to vendors for advertising, printing, and supplies) involving the proceeds of unlawful activity (i.e., mail and wire fraud)

with the intent to promote unlawful activity (i.e., further mail and wire fraud).

Mr. Grasso now argues that payments made to America's Classified, Lelli Printing, Western States, and Spare Time Magazine, for printing, advertising, postage, and supplies cannot be considered transactions designed to promote future specified unlawful activity or to achieve the success of completed or ongoing criminal activity, because the activity, i.e., mail and wire fraud, was already complete at the time payment was made.[6] In other words, Mr. Grasso contends that his payment for services rendered cannot be considered *promotion* of an already completed fraud.

Defendant's argument must fail for two reasons. First, contrary to Mr. Grasso's representations, not all the payments to vendors were for work previously preformed. A substantial number of the financial transactions were payments for the promotion of ongoing or future fraudulent activity. For example, because he was such a large customer, America's Classifieds required Mr. Grasso to pay by wire transfer when he approved advertising to eliminate the risk that it would not be paid-after the advertising was placed, (N.T. 2/20/02, pp. 99-101), Lelli Printing charged Mr. Grasso for postage as it was being used for a specific project (N.T. 2/13/02, p 155) and Spare Time Magazine billed Mr. Grasso for advertising to be placed in multiple future issues (N.T. 2/21/02, p.117-119).

Second, and more importantly, it is irrelevant whether the payments were made before, during, or after the fraudulent activity. The Third Circuit Court of Appeals

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[6] The Court notes that this argument is similar to the one presented before Judge Kauffman in Defendant's Motion to Dismiss the Money Laundering Counts. There, Defendant unsuccessfully argued that the payment to the vendors was not money laundering because the fraud could not be considered complete until the vendors were paid.

has held that "a defendant can engage in financial transactions that promote not only ongoing or future unlawful activity, but also prior unlawful activity." *Paramo,* 998 F.2d at 1218. In an ongoing fraudulent scheme like the one for which Defendant was convicted, money laundering occurs when proceeds of an illegal act are used to further the unlawful scheme. *See, e.g., United States* v. *Cefaratti,* 221 F.3d 502, 511 (3d Cir. 2000) (holding that-the defendant laundered money when he reinvested fraudulently obtained educational loan money into his school); *United States v. Conley,* 37 F.3d 970, 980 (3d Cir. 1994} (holding that the defendant laundered money when he used money collected from illegal poker machines to purchase more poker machines). Defendant was therefore promoting his fraudulent scheme by paying the bills necessary to keep the fraud alive and growing.

B. Net Income v. Gross Receipts

Mr. Grasso next argues that the government has failed to establish money laundering because it did not prove at trial that the transactions with America's Classified, Lelli Printing, Western States, and Spare Time Magazine were conducted with "net income " In support of his position, Mr. Grasso cites a recently decided Seventh Circuit case, *United States v. Scialabba,* 282 F.3d 475 (7th Cir. 2002). In *Scialabba,* the Seventh Circuit vacated the money laundering convictions of defendants - who illegally furnished video poker machines to bars and restaurants - where evidence established only that defendants used the money deposited in the poker machines to meet expenses of the business and to pay the owners of the establishments in which the machines were operated. *Scialabba* stated that when "a crime entails voluntary, business-like operations, 'proceeds' must be net income; otherwise, the predicate crime merges into money laundering (for no business can be carried on

without expenses) and the word 'proceeds' loses operational significance." *Scialabba,* 282 F.3d at 475.

I decline follow the reasoning set forth in *Scialabba* as it is susceptible to criticism on several grounds. First, the Seventh Circuit's definition of "proceeds" runs contrary to authorities on the plain meaning of the word. *See, e.g.,* BLACK'S LAW DICTIONARY 1222 (7th ed. 1999) (listing "net proceeds" as a separate entry under "proceeds"). Second, limiting "proceeds" to "net profits" as the Seventh Circuit has done, may lead to curious results. Specifically, under the rationale set forth in *Scialabba,*"[o]ne could argue that so long as the illegal enterprise had no net profit, no money laundering prosecution would be possible. Because Congress could not have intended such a result, the court follows the majority of circuits in holding that 'proceeds' should be interpreted as "total revenue" rather than 'net profits.'" *United States* v. *Iacaboni,* 221 F. Supp. 2d 104,112 (D. Mass. 2002) (citing *United States v. Hurley,* 63 F.3d 1, 21 (1st Cir. 1995)).

The Third Circuit has decided numerous cases in which it has read the money laundering statute to prohibit transactions undertaken to promote additional criminal conduct by reinvesting the proceeds of criminal conduct. *Cefaratti,* 221 F.3d at 511; *Conley,* 37 F.3d at 980; *United States* v. *Diaz,* 245 F,3d 294, 305 (3d Cir. 2002); *United States v. Smith,* 186 F.3d 290, 298 (3d Cir. 1999). In these opinions, the Third Circuit has never intimated that the term "proceeds" in 18 U.S.C. § 1956(a)(l) should be read as "net proceeds". I will not deviate from the Third Circuit's reading of the money laundering statute.

CONCLUSION

For the foregoing reasons, I will deny Defendant's Motion and sentence Mr. Grasso under the money laundering guidelines. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	:	
OF AMERICA	:	**CRIMINAL ACTION**
	:	
v.	:	**NO. 00-CR-51**
	:	**NO. 01-CR-783**
MICHAEL J. GRASSO, JR.	:	

ORDER

AND NOW, this 15 day of January, 2003, upon consideration of Defendant Michael Grasso's Motion for Judgment of Acquittal on the Money Laundering Counts (Criminal Number 00-CR-51, docket no. 128), the Government's Reply Memorandum (Criminal Number 00-CR-51, docket no. 133), and following oral argument therein, it is hereby **ORDERED** that:

Defendant's Motion is **DENIED.** Accordingly, Defendant will be sentenced under the money laundering counts in connection with Criminal Number 00-CR-51.

BY THE COURT:

/s/ Berle M. Schiller
BERLE M. SCHILLER, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 03-1441/03-1442

UNITED STATES OF AMERICA

v.

MICHAEL J. GRASSO, JR.,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Action Nos. 00-cr-00051-1/01-cr-00783-1)
District Judge: Honorable Berle M. Schiller

Argued December 12, 2003
[ENTERED: September 21, 2004]

Present: SCIRICA, Chief Judge. SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, FISHER, VAN ANTWERPEN and GARTH*, Circuit Judges

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SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

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* Judge Garth's vote is limited to panel rehearing only.

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the Circuit in regular active service not having voted for rehearing by the court *en banc,* the petition for rehearing is DENIED.

By the Court,

/s/ Thomas L. Ambro, Circuit Judge

Dated: September 21,2004
LML/cc Walter M. Phillips Jr., Esq.
(Anne W. Chain, Esq.
(Peter F. Schenck, Esq.

U.S. Const. Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. § 1956(a)(1). Laundering of monetary instruments:

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity -

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part -

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

U.S. Sentencing Guidelines Manual § 2B1.1(b)(1) (2001):

Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

* * *

(b) Specific Offense Characteristics

(1) If the loss exceeded $5,000, increase the offense level as follows:

Loss(Apply the Greatest)		Increase in Level
(A)	$5,000 or less	no increase
(B)	More than $5,000	add 2
(C)	More than $10,000	add 4
(D)	More than $30,000	add 6
(E)	More than $70,000	add 8
(F)	More than $120,000	add 10
(G)	More than $200,000	add 12
(H)	More than $400,000	add 14
(I)	More than $1,000,000	add 16
(J)	More than $2,500,000	add 18
(K)	More than $7,000,000	add 20
(L)	More than $20,000,000	add 22
(M)	More than $50,000,000	add 24
(N)	More than $100,000,000	add 26

U.S. Sentencing Guidelines § 2S1.1:

Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

(a) Base Offense Level:

(1) The offense level for the underlying offense from which the laundered funds were derived if (A) the defendant committed the underlying offense (or would be accountable for the underlying offense under subsection (a)(1)(A) of §1B1.3 (Relevant Conduct)); and (B) the offense level for that offense can be determined; or

(2) 8 plus the number of offense levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the laundered funds, otherwise.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; and (B) the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote (i) an offense involving the manufacture, importation, or distribution of a controlled substance or a listed chemical; (ii) a crime of violence; or (iii) an offense involving firearms, explosives, national security, terrorism, or the sexual exploitation of a minor, increase by 6 levels.

(2) (Apply the Greatest):

(A) If the defendant was convicted under 18 U.S.C. § 1957, increase by 1 level.

(B) If the defendant was convicted under 18 U.S.C. § 1956, increase by 2 levels.

(C) If (i) subsection (a)(2) applies; and (ii) the defendant was in the business of laundering funds, increase by 4 levels.

(3) If (A) subsection (b)(2)(B) applies; and (B) the offense involved sophisticated laundering, increase by 2 levels.

(2)

No. 04-858

In the Supreme Court of the United States

MICHAEL J. GRASSO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the word "proceeds" in the principal federal money laundering statute, 18 U.S.C. 1956(a)(1), which makes it a crime, *inter alia*, to engage in a financial transaction using the "proceeds" of certain specified unlawful activities with the intent to promote the carrying on of those activities, means the gross receipts from the unlawful activities or only the profits —*i.e.*, gross receipts less expenses.

2. Whether the enhancement, under the Sentencing Guidelines, of petitioner's sentence for money laundering based on the amount of money he laundered violated the Sixth Amendment because it rested on a factual determination not made by the jury.

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In the Supreme Court of the United States

No. 04-858

MICHAEL J. GRASSO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 381 F.3d 160. The memorandum, order, and judgment of the district court (Pet. App. 23a-34a, 35a-41a, 42a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2004. The petition for rehearing was denied on September 21, 2004 (Pet. App. 43a-44a). The petition for a writ of certiorari was filed on December 20, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on 10 counts of mail fraud, in violation of 18 U.S.C. 1341; two counts of wire fraud, in violation of 18 U.S.C. 1343; and 480 counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i).[1] He was sentenced to 97 months of imprisonment, to be followed by a three-year term of supervised release. In addition, he was fined $150,000, and ordered to pay restitution in the amount of $761,126.39 and a special assessment of $49,500. The court of appeals affirmed the convictions and sentence, but vacated the restitution order and remanded the case to the district court for reconsideration of that order. Pet. App. 1a-22a; *id.* at 23a.

1. The evidence at trial established that, from early 1997 to late 1999, petitioner fraudulently sold various work-at-home programs. Pursuant to his scheme, petitioner placed advertisements in national magazines and sent direct mailings stating that, for a fee ranging from $10 to $40, purchasers could become employed stuffing envelopes and stapling booklets at home. When purchasers mailed in their money, they received a set of written instructions that explained how they too could place advertisements offering work-at-home employment similar to those to which they had responded. During the period covered by the scheme, petitioner deposited over $10 million into various bank accounts. Petitioner used the proceeds of his fraudulent activity to

---

[1] Although the petition states (Pet. 2) that petitioner was convicted on 482 counts of money laundering, two of those counts were dismissed at trial. Pet. App. 4a n.4; *id.* at 23a.

cover the advertising, printing, telephone and mailing expenses of the ongoing scheme. Pet. App. 3a, 36a-37a.

2. The federal money laundering statute at issue here makes it a crime when anyone,

> knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or * * *
>
> (B) knowing that the transaction is designed in whole or in part—
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.

18 U.S.C. 1956(a)(1). In essence, subsection (A)(i) prohibits transactions involving the proceeds of specified crimes to promote any of those crimes, and subsection (B)(i) prohibits transactions involving the proceeds of specified crimes to conceal the fact that they are the product of crime.

The money laundering statute defines "specified unlawful activity" to include, among a variety of other offenses, the racketeering acts enumerated in 18 U.S.C. 1961(1) (2000 & Supp. I 2001). See 18 U.S.C. 1956(c)(7)(A). The racketeering offenses listed in Section 1961(1) in turn include mail fraud in violation of

18 U.S.C. 1341, and wire fraud in violation of 18 U.S.C. 1343. See 18 U.S.C. 1961(1)(B) (2000 & Supp. I 2001).

3. As relevant here, petitioner was charged with and convicted of violating the promotion subsection of the money laundering statute, 18 U.S.C. 1956(a)(1)(A)(i), by using the proceeds of his fraudulent scheme to cover the scheme's advertising, printing, telephone and mailing costs, and thereby to facilitate the continuation of the scheme.

More than seven months after the jury verdict, petitioner filed in the district court a motion for judgment of acquittal on the money laundering counts, relying upon *United States* v. *Scialabba*, 282 F.3d 475 (7th Cir.), cert. denied, 537 U.S. 1071 (2002). He argued for the first time that, because "proceeds" in the money laundering statute means "profits," the government's evidence that he used funds from his fraudulent scheme to pay overhead expenses of the scheme was insufficient to support his convictions on those counts. Pet. App. 7a-8a & n.8. Although the motion was untimely under Federal Rule of Criminal Procedure 29, the parties agreed that the district court could consider the motion for the limited purpose of determining whether petitioner should be sentenced under the Sentencing Guidelines for money laundering or under those for fraud. Pet. App. 8a; *id.* at 36a & n.4. The district court rejected petitioner's argument. Reasoning that *Scialabba* was "susceptible to criticism on several grounds," it concluded that "proceeds" means gross revenues. *Id.* at 40a.

4. a. As relevant here, the court of appeals affirmed petitioner's money laundering convictions. As an initial matter, the court concluded that, by failing to raise his claim in a timely motion for judgment of acquittal under

Federal Rule of Criminal Procedure 29, petitioner forfeited his argument that the word "proceeds" in the money laundering statute denotes net profits rather than gross receipts. Accordingly, the court held that his claim was reviewable only for plain error under Federal Rule of Criminal Procedure 52(b). Pet. App. 7a-10a.

The court of appeals held that petitioner could not meet that standard because the district court had committed no error. The court concluded that "proceeds" as used in the money laundering statute means gross receipts rather than net profits. Pet. App. 11a-17a. In reaching that conclusion, the court considered "the conventional understanding of the term, the text and purpose of § 1956, and existing case law in [the Third] Circuit." *Id.* at 12a.

After noting that Section 1956 does not define "proceeds," the court of appeals consulted dictionary definitions of the word and found them "neither uniform nor dispositive." Pet. App. 13a. The court observed that judicial constructions of the word in other statutory contexts "also vary," though it observed that, in construing the scope of criminal forfeiture of "proceeds" under the Racketeer Influenced and Corrupt Organizations Act (RICO) statute, 18 U.S.C. 1963(a)(3), most courts have held that proceeds involve "more than net profits." Pet. App. 13a-14a. The court further observed that the Seventh Circuit is alone in its "restrictive definition" of "proceeds" in the money laundering statute, *id.* at 14a, and that the First Circuit in *United States* v. *Iacaboni*, 363 F.3d 1, 4, cert. denied, 125 S. Ct. 480 (2004), specifically rejected the Seventh Circuit's view that "proceeds" in that statute means profits rather than total revenue, Pet. App. 14a-15a.

The court of appeals ultimately concluded that "the best approach * * * is to examine the statute itself for indications of the intended scope of the term." Pet. App. 15a. The court explained that, although the money laundering statute criminalizes financial transactions aimed at the concealment of proceeds—the "conventional understanding" of money laundering—it also criminalizes financial transactions aimed at promoting illegal activity. *Id.* at 15a-16a. The court concluded that "[b]y reinvesting the proceeds of his fraudulent scheme in order to sustain it, [petitioner] promoted unlawful activity within the meaning of the statute—regardless whether the funds were profits or gross receipts." *Id.* at 16a.

The court of appeals observed that, in *Scialabba*, the Seventh Circuit was concerned that, if "proceeds" means "gross income," then, as a matter of statutory construction, it might not be appropriate to convict a defendant of both money laundering and the underlying "specified criminal activity." Pet. App. 16a (citing *Scialabba*, 282 F.3d at 477). The court here rejected that concern. It relied (Pet. App. 17a) on its previous decision in *United States* v. *Conley*, 37 F.3d 970 (3d Cir. 1994), which held that prosecution for a substantive offense and for money laundering to promote that offense does not implicate double jeopardy when the statutory elements of the offenses differ. *Id.* at 978-979. It also noted (Pet. App. 17a) its previous decision in *United States* v. *Omoruyi*, 260 F.3d 291 (3d Cir. 2001), cert. denied, 534 U.S. 1100 (2002), which held that "conduct constituting the underlying offense conduct may overlap with the conduct constituting money laundering." *Id.* at 295.

Finally, the court of appeals explained that it had "regularly" upheld money laundering prosecutions based on the reinvestment of proceeds without ever suggesting that "proceeds must be net." Pet. App. 17a. Finding "no reason to adopt such a requirement now," the court concluded that "proceeds," as the word is used in Section 1956, "means simply gross receipts from illegal activity," and that "[a]n individual may engage in money laundering regardless whether his or her criminal endeavor ultimately turns a profit." *Ibid.* Accordingly, the court held that petitioner had failed to establish "error of any sort, let alone plain error." *Ibid.*

b. After oral argument in the court of appeals but before the court issued its decision, petitioner submitted a letter pursuant to Federal Rule of Appellate Procedure 28(j), relying on *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). Petitioner contended that his sentence for money laundering violated the Sixth Amendment because it included an 18-level enhancement based on the amount of money he laundered (see Sentencing Guidelines §§ 2B1.1(b)(1), 2S1.1(a)(2) (2001)) without any jury determination of that amount. The court of appeals did not address that argument in its decision.

DISCUSSION

1. Petitioner seeks review on the question whether "proceeds" within the meaning of 18 U.S.C. 1956(a)(1)(A)(i) means "net profits" rather than "gross receipts," contending that the decision below conflicts with the Seventh Circuit's holding in *United States* v. *Scialabba*, 282 F.3d 475, cert. denied, 537 U.S. 1071 (2002). The court of appeals correctly rejected the view that "proceeds" means net profits, and, although there

is a conflict in the circuits on that question, further review of the issue is not warranted in this case.

a. As the Third Circuit noted, Pet. App. 14a-15a, its ruling in this case that the word "proceeds" means gross receipts and not profits is consistent with the First Circuit's decision in *United States* v. *Iacaboni*, 363 F.3d 1, cert. denied, 125 S. Ct. 480 (2004). In *Iacaboni*, the defendant pleaded guilty to laundering the proceeds of an illegal sports gambling operation, in violation of 18 U.S.C. 1956(a)(1)(A)(i), by using the proceeds of the operation to, among other things, pay winning bettors. 363 F.3d at 3, 4. On appeal, the defendant contended that the district court's order forfeiting property "involved in" the money laundering offense under 18 U.S.C. 982(a)(1) (Supp. I 2001) was erroneous because his payments to winning bettors were an integral part of the gambling operation and therefore could not constitute money laundering. 363 F.3d at 4. The court of appeals rejected that claim, holding that the word "proceeds" in the money laundering statute does not mean net profits. *Ibid.*

The definition of "proceeds" adopted by the court below is also consistent with the definition used by the Sixth Circuit. In *United States* v. *Haun*, 90 F.3d 1096, 1101 (1996), cert. denied, 519 U.S. 1059 (1997), the Sixth Circuit rejected a due process challenge to Section 1956(a)(1)(A)(i) that rested on the contention that the word "proceeds" is unconstitutionally vague. The court of appeals held that "proceeds" is not unconstitutionally vague because it "is a commonly understood word in the English language" that includes "what is produced by or derived from something (as a sale, investment, levy, business) by way of *total revenue*." *Haun*, 90 F.3d at 1101 (emphasis added) (quoting *Webster's Third New*

International Dictionary 1807 (1971)). Accord *United States* v. *Prince*, 214 F.3d 740, 747 (6th Cir.), cert. denied, 531 U.S. 974 (2000); see *United States* v. *Monaco*, 194 F.3d 381, 385-386 (2d Cir. 1999) (rejecting vagueness challenge to the word "proceeds" in Section 1956(a)(1) and quoting *Haun*, 90 F.3d at 1101, for the proposition that "'[p]roceeds' is a commonly understood word in the English language"), cert. denied, 529 U.S. 1028 (2000).

As both the court below (Pet. App. 14a-17a) and the *Iacaboni* court (363 F.3d at 4) explicitly recognized, however, the Seventh Circuit has taken the contrary view, defining the word "proceeds" in the money laundering statute as "profits." In *Scialabba*, the defendants provided video poker and slot machines to bars, restaurants, and other retail outlets. Each week they opened the machines and collected any deposited money, which they then used to reimburse the outlet owners for payments to winning customers, to pay the outlet owners for their role, to lease the gambling machines, and to obtain the amusement licenses necessary to operate the machines. See *Scialabba*, 282 F.3d at 476. For these expenditures, they were convicted of laundering the proceeds of an illegal gambling operation, in violation of 18 U.S.C. 1956(a)(1)(A)(i). The court of appeals vacated the money laundering convictions on the ground that "proceeds" in the money laundering statute means "profits" and that funds used to cover the overhead expenses of an illegal activity are not "proceeds" under that definition. 282 F.3d at 477. That decision is irreconcilable with the holding of the court below that "proceeds" are not limited to profits for purposes of the money laundering statute. In a more recent case involving the meaning of the word "proceeds" in the

RICO forfeiture provision, 18 U.S.C. 1963(a)(3), a panel of the Seventh Circuit, citing *Scialabba*, reaffirmed its view that "proceeds" means "profits." *United States* v. *Genova*, 333 F.3d 750, 761 (2003).

b. The conflict over the definition of "proceeds" in the money laundering statute raises an issue of recurring importance. Indeed, the government petitioned for a writ of certiorari in *Scialabba* to obtain resolution of that issue. This Court, however, denied the petition. 537 U.S. 1071 (2002) (No. 02-442). At that time, the disagreement in the circuits over the meaning of the word "proceeds" in the money laundering statute was not as pronounced as now. If the circuit conflict persists, review of the issue by this Court would be warranted in an appropriate case. This case is not a suitable vehicle for review of that question, however, for two independent reasons.

i. Because the applicable standard of review is "plain error," a definitive interpretation of the meaning of "proceeds" in the money laundering statute would not be necessary to resolve this case.

As the court of appeals held, and petitioner does not in this Court dispute, petitioner did not timely raise in the district court the claim he asserts here, and he is thus entitled only to plain-error review. Pet. App. 7a-11a. To establish plain error, petitioner must demonstrate, among other things, that any error in the district court's failure to grant a judgment of acquittal based on petitioner's "proceeds" argument was "clear" or "obvious." *United States* v. *Olano*, 507 U.S. 725, 732-733 (1993). Petitioner cannot (and does not attempt to) make that showing.

As discussed above (pp. 7-9, *supra*), with the sole exception of the Seventh Circuit, the courts of appeals

that have addressed the question have concluded that "proceeds" in the money laundering statute means gross receipts, not profits. That is the word's most common and primary meaning. See, *e.g.*, *Random House Dictionary of the English Language* 1542 (2d ed. 1987) 1542 (providing, as the initial definition of "proceeds," "something that results or accrues" and "the *total* amount derived from a sale or other transaction") (emphasis added); *Black's Law Dictionary* 1222 (7th ed. 1999) (defining "proceeds" as "1. The value of land, goods, or investments when converted into money; the amount of money received from a sale. 2. Something received upon selling, exchanging, collecting or otherwise disposing of collateral," and distinguishing "proceeds" from "net proceeds," which it defines as "[t]he amount received in a transaction minus the cost of the transaction (such as expenses and commissions)").

Moreover, courts have interpreted the word "proceeds" in related statutes to mean gross receipts. For example, again with the sole exception of the Seventh Circuit, courts of appeals have rejected the notion that "proceeds" in the RICO statute, 18 U.S.C. 1963(a)(3), means net profits. See *United States* v. *Simmons*, 154 F.3d 765, 770-771 (8th Cir. 1998) (defining "proceeds" as "gross revenues"); *United States* v. *DeFries*, 129 F.3d 1293, 1314 (D.C. Cir. 1997) (same); *United States* v. *Hurley*, 63 F.3d 1, 21 (1st Cir. 1995) (same), cert. denied, 517 U.S. 1105 (1996); *United States* v. *Lizza Indus., Inc.*, 775 F.2d 492, 497-499 (2d Cir. 1985) (defining "proceeds" as "gross profits," meaning total revenue minus direct costs but not indirect operating expenses or taxes), cert. denied, 475 U.S. 1082 (1986); but see *Genova*, 333 F.3d at 761. See also *United States* v. *McHan*, 101 F.3d 1027, 1041-1043 (4th Cir. 1996) (reject-

ing a "net income" definition of "proceeds" as used in the drug trafficking statute, 21 U.S.C. 853), cert. denied, 520 U.S. 1281 (1997).

Finally, the notion that "proceeds" *obviously* means profits cannot be squared with the numerous cases in which courts of appeals, without analyzing whether the funds at issue were "profits," have found sufficient evidence to support money laundering convictions based on the use of illegal funds to pay the expenses of the criminal operation.[2]

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[2] See, *e.g.*, *United States* v. *Evans*, 272 F.3d 1069, 1082 (8th Cir. 2001) (payments by prostitute to escort agency from proceeds of prostitution), cert. denied, 537 U.S. 857 (2002); *United States* v. *Godwin*, 272 F.3d 659, 669 (4th Cir. 2001) (use of proceeds from Ponzi scheme to pay "interest" to dissatisfied investors to promote continuation of scheme), cert. denied, 535 U.S. 1069 (2002); *United States* v. *Barragan*, 263 F.3d 919, 924 (9th Cir. 2001) (use of drug proceeds to rent motel rooms for conducting future drug transactions); *United States* v. *Wyly*, 193 F.3d 289, 295-296 (5th Cir. 1999) (kickback to public official for his participation in fraud scheme); *United States* v. *Rudisill*, 187 F.3d 1260, 1267 (11th Cir. 1999) (use of proceeds from illegal telemarketing scheme to cover payroll expenses of scheme); *United States* v. *King*, 169 F.3d 1035, 1039 (6th Cir.) (use of drug proceeds to pay couriers for drugs delivered on consignment), cert. denied, 528 U.S. 892 (1999); *United States* v. *France*, 164 F.3d 203, 208-209 (4th Cir. 1998) (use of drug proceeds to post bail for confederate in scheme), cert. denied, 527 U.S. 1010 (1999); *United States* v. *Hillebrand*, 152 F.3d 756, 762 (8th Cir.) (use of proceeds of fraud scheme to pay for office supplies, secretarial services, and staff wages in furtherance of scheme), cert. denied, 525 U.S. 1033 (1998); *United States* v. *Coscarelli*, 105 F.3d 984, 990 (5th Cir.) (use of proceeds of telemarketing fraud to pay co-conspirators and cover overhead expenses), vacated, 111 F.3d 376 (5th Cir. 1997), reinstated, 149 F.3d 342 (5th Cir. 1998) (en banc); *United States* v. *Marbella*, 73 F.3d 1508, 1514 (9th Cir.), cert. denied, 518 U.S. 1020 (1996) (use of proceeds from fraud scheme to compensate individuals for referring victim).

Indeed, petitioner's reliance (Pet. 12) on the rule of lenity effectively concedes that it is not clear or obvious that "proceeds," as used in the money laundering statute, means profits. As this Court has explained, the rule of lenity comes into play only if there is a "grievous ambiguity or uncertainty in the language and structure of the Act," *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974), such that even "after 'seizing every thing from which aid can be derived'" the Court is "left with an ambiguous statute." *United States* v. *Bass*, 404 U.S. 336, 347 (1971) (quoting *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805)).

Accordingly, any error by the courts below was not "plain error." This is therefore not a suitable vehicle to review the first question presented because, even were the Court to conclude that "proceeds" means net profits, it would have to affirm the judgment below.[3]

ii. The circuit conflict also may not persist. The Acting Solicitor General has authorized the government to seek initial en banc review in an appeal currently pending in the Seventh Circuit to ask that circuit to reconsider its holding in *Scialabba* that "proceeds" means net profits.

In *United States* v. *Santos*, 342 F. Supp. 2d 781, 798-799 (N.D. Ind. 2004), a district court in the Seventh Circuit recently vacated a defendant's convictions for

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[3] Contrary to petitioner's assertion (Pet. 7, 16), the United States did not take the position in its brief in opposition to the petition for certiorari in *Iacoboni* that this case was a suitable vehicle to review the "proceeds" issue. See U.S. Br. in Opp., *Iacaboni*, *supra* (No. 04-183). Rather, the government compared certain aspects of the *Iacaboni* decision to the decision in this case to demonstrate the distinct reasons why *Iacaboni* was an unsuitable vehicle to review the "proceeds" question. *Id.* at 12, 14.

promotional money laundering in reliance on *Scialabba*. Granting the defendant's petition under 28 U.S.C. 2255, the district court concluded that the defendant's use of gross receipts from his illegal gambling operation to pay his winning customers and his money collectors did not violate Section 1956(a)(1). 342 F. Supp. 2d at 799. The Acting Solicitor General has authorized the government to appeal that decision and to seek initial en banc review in the Seventh Circuit to challenge directly the holding in *Scialabba* that "proceeds" in the money laundering statute means net profits rather than gross receipts.

There is reason to believe the Seventh Circuit may grant en banc review in *Santos*. When the government petitioned for rehearing en banc in *Scialabba*, an evenly-divided court (with Judge Williams recused) denied the petition. See *Scialabba*, 282 F.3d at 475 & n.*. Since that time, the conflict in the circuits has widened with the issuance of the decisions by the Third Circuit in this case and by the First Circuit in *Iacaboni*. Until the Seventh Circuit has had an opportunity in *Santos* to reconsider *Scialabba* in light of the subsequent decisions from other circuits expressly rejecting its holding, review by this Court would be premature.

2. Petitioner also contends that his sentence under the federal Sentencing Guidelines violates the Sixth Amendment because the district court increased his sentence based on a fact—the amount of money he laundered (see Sentencing Guidelines §§ 2B1.1(b)(1), 2S1.1(a)(2) (2001))—that was not found by the jury. Petitioner relies on *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), which held that a sentence imposed under the Washington State sentencing guidelines violated the Sixth Amendment because the defendant's sentence was enhanced based on facts not found by the jury. Sub-

sequent to the filing of the petition in this case, this Court held that the Sixth Amendment, as construed in *Blakely*, applies to the federal Sentencing Guidelines. *United States* v. *Booker*, 125 S. Ct. 738, 748-756 (2005) (Stevens, J., for the Court). In answering the remedial question in that decision, the Court applied severability analysis and held that the guidelines are advisory rather than mandatory, and that federal sentences are reviewable for reasonableness. *Id.* at 757-764 (Breyer, J., for the Court). Accordingly, with respect to question two in the petition, the appropriate disposition is to grant certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Booker*. The court of appeals can then decide what effect, if any, that decision has on petitioner's sentence, taking into account any applicable doctrines of waiver, forfeiture, and harmless error. See *id.* at 769.

CONCLUSION

With respect to the first issue presented, the petition for a writ of certiorari should be denied. With respect to the second issue, the Court should grant the petition, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Booker* v. *United States*, 125 S. Ct. 738 (2005).

Respectfully submitted.

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FEBRUARY 2005

(3)

No. 04-858

Supreme Court, U.S.
FILED
MAR 21 2005
OFFICE OF THE CLERK

In The

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MICHAEL J. GRASSO, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No. 04-858

In the Supreme Court of the United States

Michael J. Grasso, Jr.
Petitioner,
v.

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Mr. Grasso submits this Reply Memorandum in Further Support of Petition for a Writ of Certiorari

A. There Is Still A Circuit Split With Respect To The Interpretation Of The Term "Proceeds" In The Money Laundering Statute

As set forth in the Petition for Writ of Certiorari, there is currently a split in the circuits regarding the interpretation of the term "proceeds" in the money laundering statute. The government argues that there is a possibility that the split "may not persist" given an appeal currently pending in the Seventh Circuit Court of Appeals.

The Seventh Circuit in *United States v. Scialabba*, 282 F.3d 475 (7th Cir.), *reh'g and reh'g en banc denied* (7th Cir.), *cert. denied*, 537 U.S. 1071 (2002), held that a defendant cannot be convict of money laundering

unless the government proves that the proceeds in question represent net income of the underlying illegal activity. The Seventh Circuit denied rehearing and rehearing *en banc* in *Scialabba*. The First Circuit and Third Circuit have held that the term "proceeds" in the money laundering statute means gross receipts and not net income. *United States v. Grasso*, 361 F.3d 160 (3d Cir. 2004); *United States v. Iacaboni*, 363 F.3d 1 (1st Cir.), *reh'g and reh'g en banc denied* (1st Cir.), *cert. denied*, 125 S. Ct. 480 (2004).

The government contends that this split might be eliminated by a case currently pending in the Seventh Circuit. In *United States v. Santos*, 342 F. Supp. 2d 781, 798-99 (N.D. Ind. 2004), the district court followed *Scialabba* in vacating a defendant's money laundering conviction. The government has appealed, and has filed a motion for initial *en banc* review. *United States v. Santos*, No. 04-4221 (7th Cir.). There is no indication, however, that the Seventh Circuit will grant *en banc* review or abandon its *Scialabba* decision.

The government's hope that the Seventh Circuit will reverse course is no reason to deny the instant petition. The circuit split exists today. Although the government urges that this case should be dismissed as to this issue, the most this Court should do is hold it in abeyance pending a decision by the Seventh Circuit in *Santos*.

B. Mr. Grasso Agrees That The Court Should Grant The Petition For Certiorari On The Sentencing Issue, Vacate The Judgment, And Remand The Matter To The Third Circuit For Consideration In Light Of *United States v. Booker*

In the Petition, Mr. Grasso contended that his sentence under the money laundering guidelines was unconstitutional pursuant to this Court's decision in *Blakely v. Washington*, 542 U.S. ___, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004). Since Mr. Grasso filed his petition, this Court decided *United States v. Booker*, 543 U.S. ___, 160 L. Ed. 2d 621, 125 S. Ct. 735 (2005). Mr. Grasso agrees with the government that the appropriate disposition of the sentencing issue is to grant the petition for writ of certiorari, vacate the judgment, and remand the case to the United States Court of Appeals for the Third Circuit for further consideration in light of *Booker*. The Court has followed this procedure in hundreds of sentencing cases post-*Booker*. *E.g.*, *Gordon v. United States*, 2005 U.S. LEXIS 2214, 73 U.S.L.W. 3528 (Mar. 7, 2005).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court should proceed with the money laundering issues while vacating the sentence and remanding the case to the Third Circuit for further consideration of the sentencing issues in light of *Booker*.

Respectfully submitted,

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